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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

APR - 1 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
Implementation of the Cable Television)
Consumer Protection and Competition)
Act of 1992)

MM Docket No. 92-266 /

Rate Regulation)

TO: THE COMMISSION

**EMERGENCY
MOTION FOR STAY**

Daniels Cablevision, Inc. ("Daniels"), the owner and operator of cable television systems in California, hereby moves that the Commission stay its announced "freeze" on the terms and conditions by which cable television operators may offer their services to the public.^{1/} The grounds for stay are that the Commission's action exceeds its authority, as limited by the First Amendment, and unlawfully abridges freedoms guaranteed to Daniels, and to all cable television operators, by the U.S. Constitution.

On April 1, 1993, in an open meeting, the Commission publicly announced, inter alia, an action comprehensively "freezing" cable television subscription rates effective April 5, 1993. Presumably, this freeze will extend to, and bar, the cable

^{1/} Because the contested freeze-action was publicly disclosed only this day, and is scheduled to go into effect in two business days, immediate ex parte relief is appropriate. Movant Daniels is prepared to argue its motion before the Commission at any time.

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operators' exercise of editorial discretion in the selection and arrangement of those communications published over the privately owned, closed-circuit distribution system. Such freeze order, on its face, constitutes an impermissible "burden" and an unconstitutional prior restraint on communication and on communicative activity as protected under the First Amendment to the United States Constitution. City of Cincinnati v. Discovery Network, Inc., ___ U.S. ___, Case No. 91-1200, decided March 24, 1993, Slip Op. at 13-20; Arkansas Writers' Project v. Ragland, 481 U.S. 221 (1987); Simon & Schuster, Inc. v. Member of New York State Crime Victims Bd., 112 S. Ct. 501 (1991); Riley v. National Fed'n of the Blind, 487 U.S. 781, 791, 798-801 (1988). The Commission's freeze-order, on its face, is aimed squarely at the content of those communications distributed over, or accessible by, the cable television media, and thus the restraint is "content based" and communicative in character.

The contested restraint is applied in advance and targets only one component of the press. It unlawfully conditions distribution of fully protected speech over a fully protected vehicle of mass communication. Unless the cable television speaker defers to the Commission's administrative mandate, the restraint is absolute. The Commission's action, therefore, facially confronts the command of the First Amendment and, at best, is presumptively unconstitutional. See, Discovery Network,

supra, Slip Op. at 18-20; National Treasury Employees Union v. U.S.A., ___ F.2d ___, U.S. Court of Appeals, D.C. Circuit, Case No. 92-5085, decided March 30, 1993, Slip Op. at 6. No other media or product of mass communication are rate regulated nor could they be. Therefore, the federal freeze in question is unprecedented.

The freeze-order is neither mandated by nor authorized under the 1992 Cable Act. The content-based restraint on "press" and "speech" activity results from, and is the product of, the Commission's exercise of discretion. Thus, the content-based action is facially in conflict with the First Amendment. City of Lakewood v. Plain Dealer Pub. Co., 486 U.S. 750 (1988).

If the freeze in question is not forthwith stayed, Daniels' constitutionally guaranteed freedoms of speech and press will be unlawfully abridged. Interference with First Amendment rights, however temporary, constitutes irreparable injury. Elrod v. Burns, 427 U.S. 347, 373 (1976)(plurality op.)("The loss of First Amendment freedoms for even minimal periods of time, unquestionably constitutes irreparable injury"). See Columbia Broadcasting sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 122 (1973)("[T]he public interest standard [of the Communications Act] necessarily invites reference to First Amendment principles"). See also id. at 125 ("Calculated risks of abuse are

taken in order to preserve higher values. The presence of these risks is nothing new; the authors of the Bill of Rights accepted the reality that these risks were evils for which there was no acceptable remedy other than a spirit of moderation and a sense of responsibility - and civility - on the part of those who exercise the guaranteed freedoms of expression.").

Finally, this proceeding has been permeated by political intrusion from powerful "Hill" sources. See, e.g., letters to the Commission Chairman dated March 19 and 22 from Senate and House Committee chairman and others. Cf. West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943)("The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts").

Accordingly, the Commission should stay the order in question pending final administrative and judicial resolution of

the substantial constitutional question raised by the agency's action.

Respectfully submitted,
DANIELS CABLEVISION, INC.

By: 

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April 1, 1993

CERTIFICATE OF SERVICE

I, Sharon K. Mathis, a secretary with the law firm of Cole, Raywid & Braverman, do hereby certify that copies of this Emergency Motion for Stay have been hand-served this 1st day of April, 1993 upon the following:

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